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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-273

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,

Petitioners,

v.

PAULETTE PAPILSKY,

Respondent.

AFFILIATED FUND, INC., LORD, ABBETT & CO., ROBERT S. DRISCOLL and ALVIN H. BERNDT,

Petitioners,

v.

HARRY LEVINE,

Respondent.

BRIEF OF HARRY LEVINE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Reasons For Not Granting The Writ

I

The Decision Below Is Consistent With *Cohen* v. *Beneficial Industrial Loan Corp.*

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) this Court stated:

> "This decision appears to fall in that small class which finally determine claims of right separable from,

> and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. * * *.
>
> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents a serious and unsettled question."

The decision of the District Court below was made on a pleading question (A-34). A reversal of that decision by this Court would lead, at most, to discovery of the directors' relationship to the conduct complained of and an opportunity for further pleading. See *Brody* v. *Chemical Bank*, 482 F.2d 1111, 1114 (2d Cir. 1973).

No decision that this Court might now make on the pleading issue would be dispositive of any important claim or right.

II

There Is No Conflict With Respect To The Business Judgment Defense That Should Be Reviewed By This Court At This Time.

Neither the District Court below nor the Court of Appeals below has yet determined whether the business judgment of the Fund's board of directors affords any defense to this action. The merit of this defense should not be reviewed by this Court at this time on this record, without the benefit of lower court decisions on the matter.

The decisions of this Court delineate a reasonably clear and substantial class of cases in which a shareholder suing

derivatively can commence and maintain an action on behalf of the corporation against the express wishes and decision of a disinterested and untainted majority of the board of directors. In *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 318-319, 343, 345 (1936) both the Court's opinion and the concurring opinion held that a derivative suit may be forced upon an unwilling board where the transaction complained of is *ultra vires* or unlawfully threatens a property interest of the corporation.

In *Hawes* v. *Oakland*, 104 U.S. 450, 460 (1881) the Court stated that in addition to fraud and self-dealing by directors there were additional grounds for permitting derivative shareholder suits, including conduct that goes beyond the corporate charter or which constitutes breach of trust.

Upon this record this Court cannot determine whether the conduct complained of falls within this permitted category of derivative shareholder litigation.

CONCLUSION

For the foregoing reasons the writ should not be granted.

Dated: October 15, 1974.

Respectfully submitted,

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